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No. _____

OCT 11 1984
ALEXANDER L. STEVAS
CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term 1984

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BISMARCK,

Petitioner,

-vs-

THEODORA GEORGE HULM AND TOM A. BRIGHAM,

Respondents.

RESPONDENT HULM'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the

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THEODORE GEORGE HULM AND TOM A. BRIGHAM,

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46.1 of the Rules of this Court, motion is hereby made that the Petitioner be allowed to proceed in forma pauperis.

Petitioner's affidavit is attached to this motion.

Respectfully submitted this 8th day of October, 1984.

Richard G. Carver
VINJE LAW FIRM
Attorney at Law
523 North 4th Street
Bismarck, ND 58501
(701)258-9475
Counsel for Respondent Hulm

No. _____

In The

SUPREME COURT OF THE UNITED STATES

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF BISMARCK,

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-vs-

THEODORE GEORGE HULM AND TOM A. BRIGHAM,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Ted Hulm, aka Theodore George Hulm, being first duly sworn, being the respondent in the instant case, depose and say, in support of my Motion for Leave to Proceed In Forma Pauperis:

That because of my proverty, I am unable to stand the costs necessary for printing of the Brief in Opposition to the Application for Writ of Certiorari; that I am required to respond to the Application for Writ of Certiorari; that I am presently the debtor in a Chapter 13 petition filed with the United States Bankruptcy Court, in and for the District of North Dakota; that all of my disposable income has been required to fund the plan approved by that Court; and that I am in an impoverished condition.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the response to the Petition for a Writ of Certiorari are true.

1. Are you presently employed? YES

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. MISSOURI ELECTRIC, 527 MEMORIAL HIGHWAY, BISMARCK, ND 58501; $1760.00 MONTHLY.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received? N/A

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source? NO

a. If the answer is yes, described each source of income and state the amount received from each during the past twelve months. N/A

3. Do you own any cash or checking or savings account? YES

a. If the answer is yes, state the total value of the items owned. CHECKING ACCOUNT - $300.00-

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? YES

a. If the answer is yes, describe the property and state it approximate value. 1976 CHEVROLET 1/2 TON, 4-WHEEL PICKUP - $3000; 1976 28'X56' MOBILE HOME - $9000 EQUITY.

5. List the persons who are dependent on you for support and state your relationship to those persons. CANDY HULM; I AM HER FATHER.

I understand that a false statement or answer to any question in this affidavit will subject me to the penalties for perjury.

Theodore George Hulm
THEODORE GEORGE HULM

Subscribed and sworn to before me this 8th day of October, 1984.

Vicki J. Kunz
Vicki J. Kunz, Notary Public
Burleigh County, North Dakota
My Commission Expires: 11/2/85

-c-

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THEODORE GEORGE HULM AND TOM A. BRIGHAM,

Respondents.

RESPONDENT HULM'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUMMARY OF THE ARGUMENT

1. There exists no impermissible conflict between the circuits in the questions presented below. The differences in outcome between In re Madrid, 757 F.2d 1197 (Nev. 1984), and the case below are due exclusively to the difference in procedures authorized by state law. In re Madrid, (supra), turned upon the Nevada state laws on the foreclosure of a trust deed while the case below turned upon North Dakota state laws regarding the foreclosure of a mortgage and the rights remaining in the mortgagor subsequent to that foreclosure.

2. There is no error in the court below refusing to adopt the recommendations of the Ninth Circuit Bankruptcy Appellate Panel. The court below simply did what the Ninth Circuit did in In re Madrid, 757 F. 2d 1197 (Nev. 1984), in that it refused to adopt the recommendations of the Ninth Circuit Bankruptcy Panel. Certainly if the Ninth Circuit fails to adopt the position of its own bankruptcy panel, no fault can be found with the Eighth Circuit's declining to do the same.

ARGUMENT

1. There exists no impermissible conflict among the circuits.

The decision below does not conflict with the decision of the Ninth Circuit Court of Appeals. The case below is easily distinguishable from the Ninth Circuit Case by reason of a permissible conflict in State Law between the North Dakota Statutes and the Nevada Statutes. There exists between the Eighth and Ninth Circuits, no conflict in the decisions on the law except that which is required by State Law. In re Madrid, 757 F. 2d 1197 (Nev. 1984), was a case principally involving the foreclosure of the deed of trust and the ramifications surrounding that trust deed foreclosure. Foreclosure in that case was brought pursuant to Nevada State Law.[1]

The case in North Dakota involved a real estate mortgage as distinguished from a deed of trust which was foreclosed pursuant to the provisions of Chapter 32-19.1 of the N.D.C.C. That chapter provides for a period of redemption, which in this case was figured to be one year.[2]

Nevada Law which governs the foreclosure of deeds of trust provides for no period of redemption, and indeed the Nevada Supreme Court has ruled that there is no right of redemption in non-judicial foreclosures of deeds of trust.[3]

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1 N.R.S. 107.080 (5) Every sale made under the provisions of this section and other sections of this chapter vests in the purchaser the title of the grantor without equity or right of redemption. The sale of a lease of a dwelling unit of a cooperative housing corporation vests in the purchaser title to the shares in the corporation which accompany the lease.

2 North Dakota Century Code Section 32-19.1-04 - Redemption period to commence upon filing of summons and complaint. In the event of foreclosure under this chapter, the period of redemption will commence to run at the time of the filing of the summons and complaint in the office of the clerk of the district court, unless it is determined by the district court that the mortgagee is not entitled to judgment, and in no event will the final date for redemption be earlier than sixty days after the sheriff's sale.

3 Rankins v. Administrator of Veterans' Affairs, 555 p. 2d 483, 92 Nev. 578 (Nev. 1976)

However, in North Dakota, not only is there a period of redemption, but that period of redemption is alienable and has been held to be so by North Dakota Supreme Court.[4]

Since under North Dakota law the equity of redemption is alienable, the transfer is not complete until the mortgagor is divested of that equity of redemption by the issuance of the Sheriff's Deed at the expiration of the period of redemption.[5]

Indeed, the debtor in North Dakota is entitled on execution or foreclosure of his property to the possession, rents, use, and benefits of the property during the running of the redemption period.[6]

Thus the Madrid case upon which the petitioners rely, is easily distinguishable from the case below. In re Madrid, (supra) relied upon the effect of a state law regarding the foreclosure of a deed of trust which provided for no period of redemption. The Court below relied upon North Dakota state law governing the foreclosure of a mortgage and its accompanying

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4 Mobar v. Ellingson, 301 N.W. 2d 653 (N.D. 1981)

5 North Dakota Century Code Section 32-19.1-02. Procedure where not covered by chapter. Where not inconsistent with the provisions of this chapter, the procedure for foreclosure set forth in the laws of the state of North Dakota as now enacted or hereinafter amended shall apply and be followed in any foreclosure hereunder.

North Dakota Century Code Section 32-19-09. Certificate of sale - Deed and effect. Wherever any real property shall be sold under judgment of foreclosure pursuant to the provisions of this chapter, the officer or other person making the sale must give to the purchaser a certificate of sale as provided by section 28-23-11, and at the expiration of the time for the redemption of such property, if the same is not redeemed, the person or officer making the sale, or his successor in officer, or other officer appointed by the court, must make to the purchaser, his heirs, or assigns, or to any person who has acquired the title of such purchaser by redemption or otherwise, a deed or deeds of such property. Such deed shall vest in the grantee all the right, title, and interest of the mortgagor in and to the property by the parties to such action, their heirs and personal representatives, and also against all person claiming under them, or any of them, subsequent to the commencement of the action in which such judgment was rendered.

6 North Dakota Century Code Section 28-24-11. Debtor entitled to rents during redemption period. The debtor under an execution or foreclosure sale of his property shall be entitled to the possession, rents, use, and benefit of the property sold from the date of such sale until the expiration of the period of redemption.

right of redemption which is, under North Dakota Law, alienable. Indeed, under North Dakota Law, the debtor is entitled to full possession of the property during the period of redemption. Thus, considering the factors considered by the Court below, and further considering applicable North Dakota Law, there was, in fact, no transfer until the issuance of the Sheriff's Deed.

This Court has said:

> "As to questions controlled by State Law, conflict among Federal Circuit Courts of Appeals is not of itself reason for granting a Writ of Certioari as Supreme Court of the United States, as conflict may be merely corollary to permissible differences of opinion in State Courts." Ruhlin v. New York Life Insurance Company, 304 U.S. 202;82 L. ed. 1290;58 S.Ct. 860, (1938.)

Therefore, there is no conflict between Madrid and the instant case. The differences in outcome of the cases is due to - what this Court has termed - a permissible difference in State Laws, not a difference in interpretation of Federal Statutes. In Nevada, there was no alienable interest after the foreclosure, while in North Dakota there remained, by virtue of State Law, an alienable interest until the date of the issuance of the Sheriff's Deed.

2. The refusal of the Court below to adopt the rule of the bankruptcy appellate panel in the Case of In re Madrid, 757 F.2d 1197 (Nev. 1984), was not error.

The Eighth Circuit Court of Appeals declined to adopt the rulings of the bankruptcy panel in the case of In re Madrid, 21 B.R. 424 (Bank.App.9th Cir.1982). There is, however, no conflict among the circuits whatsoever on this point, and any claim of conflict is purely spurious. The Court of Appeals for the Ninth Circuit also declined to adopt the recommendations of its own bankruptcy panel in In re Madrid.[7]

Therefore, if the Ninth Circuit declines to adopt the reasoning of its bankruptcy panel, the Eighth Circuit is certainly not in conflict with the Ninth Circuit when it also delines to adopt the recommendations of that panel.

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7 In re Madrid, 757 F. 2d 1197 (Nev. 1984)

Furthermore, the argument of First Federal seems to be that the State Law can be used to defeat the intent and purpose of the Congress in the enactment of the specific provisions of the United States Bankruptcy Code. Obviously, this approach would require the violation of the Supremacy Clause of the United States Constitution.

CONCLUSION

For these reasons, we pray that the Petition For Writ of Certiorari be denied as there exists no impermissible division in the Circuits on the question of Federal Law, and no error in the Eighth Circuit opinion.

Respectfully submitted this 8th day of October, 1984.

RICHARD G. CARVER
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